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No. 103

In the

Supreme Court of the United States.

October Term, 1914.

JOHN H. SHELLENBARGER, - *Plaintiff in Error,*

vs.

WILLIAM M. FEWELL, - - - *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

Brief, Amicus Curiae, in Support of Contentions of Plaintiff in Error.

GRANT FOREMAN,
Amicus Curiæ.

JAMES D. SIMMS,
Of Counsel.

In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. 434.

JOHN H. SHELLENBARGER, - *Plaintiff in Error,*

vs.

WILLIAM M. FEWELL, - - - *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF, AMICUS CURIÆ, IN SUPPORT OF CONTENTIONS OF PLAINTIFF IN ERROR.

May It Please the Court:

We believe the contention of the plaintiff in error in this case is correct, and that the judgments of the courts below should be reversed. In arriving at a determination of the issues presented by the petition in error we believe that aid is to be found in a consideration of two propositions that have not been discussed in the briefs, but which nevertheless are involved in the assignment of error.

The record is silent as to the exact date the allotment was made to the heirs of Minnie Solander,

though it does inform us that it was made after the deaths of both Minnie Solander and her daughter, Hettie Solander. The court below in its opinion, 34 Okla. 91, 124 Pac. 617, says that "from the admissions in the agreed statement of facts, and the briefs of both parties, we must conclude that the allotment was selected and certificate thereof issued under the 'Original Creek Agreement' Act of Congress of March 1, 1901 (31 Stat. L. 870)." The part of that act (Sec. 28) under which the allotment was made reads as follows:

> "All citizens who were living on the first day of April, eighteen hundred and ninety nine, entitled to be enrolled under section twenty-one of the Act of Congress approved June 28th, eighteen hundred and ninety-eight, entitled 'An Act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."
>
> "The rolls so made by said commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands, and the distribution of all moneys and other property of the tribe shall be made, and to no other persons."

Minnie Solander a duly enrolled citizen of the Creek Nation died on October 8, 1899. She was survived by her sister Phoebe Trussler, a citizen of the Creek Nation, and by her husband George Solander and by her daughter Hettie Solander who died on December 19, 1899. Hettie Solander was survived by her father George Solander, who was not a citizen of the Creek Nation and was what is known as a non-citizen. Afterwards on March 1, 1901, there was enacted the Creek Agreement (31 Stat. 870), Sec. 28 of which, previously quoted, prevented the death of Minnie Solander from causing the right to an allotment in her name to lapse and either created or continued that right for the benefit of her heirs. She was one who was identified by the act as "living on the first day of April, eighteen hundred ninety-nine" "placed upon the rolls to be made by said Commission" who had "died since that time" "before receiving her allotment of lands." In such case the act said that: "the lands and money to which she would be entitled, if living, shall descend to her heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

It was by authority of this act that the allotment was made to the heirs of Minnie Solander after the death of Minnie Solander and after the death of her child Hettie Solander.

I.

When Minnie Solander died on October 1, 1899, though she was entitled to receive an allotment of Creek tribal lands, none having been selected by or for her, she was seized of no estate, legal or equitable, in the lands of the Creek Nation, and her heirs took nothing at that time by right of inheritance from her.

This conclusion has been reached in a number of cases arising in the Creek Nation.

In the case of *McKee* v. *Henry*, 201 Fed. 74, the United States Circuit Court of Appeals for the Eighth Circuit decided the question. Hugh Warden, a duly enrolled Creek citizen died in November, 1899. Though entitled to an allotment of land no selection was made for him prior to his death. Section 28 of the Original Creek Agreement of March 1, 1901, provided for such a contingency and directed that if such citizen were living on April 1, 1899, and should die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled, if living, should descend to his heirs according to the laws of descent and distribution of the Creek Nation and be allotted to them accordingly. No selection was made for him until November 12, 1902. In the meantime on June 30, 1902, the Creek Supplemental Agreement (32 Stat. L. 500), amended sec-

tion 28 of the Original Creek Agreement by providing that the descent should be according to chapter 49 of Mansfield's Digest of the Laws of Arkansas, instead of the Creek law of descent. The court was called upon to decide whether the land descended according to the law in force at the date of the death of Hugh Warden or the law in force at the time of the allotment.

The Circuit Court of Appeals held that when Hugh Warden died he was seized of no inheritable estate in the lands of the Creek Nation and that there was no estate to descend until allotment, which descended according to the law of descent then in force. The court said:

> "When the allotment was made, for the first time the rights of any individual vested, and the title became vested in the one at that time fixed by law, and it makes no difference what previous laws may have provided."

The case of *Brady* v. *Sizemore*, 33 Okla. 169, 124 Pac. 615, appealed to this court, held to the same effect; but in that case while the law of descent at the date of allotment was different from that at the death the heirs were the same.

In the case of *Brann* v. *Bell*, 192 Fed. 427, the United States Circuit Court for the Eastern District of Oklahoma held to the same rule.

In a recent opinion by this court in *Franklin* v. *Lynch*, 233 U. S. 505, the court had under considera-

tion a deed made by Emmer Sisney an intermarried member of the Choctaw Tribe of Indians by which she undertook, on October 16, 1905, before allotment, to convey her "entire interest in any and all lands, exclusive of homestead which might be finally allotted to her by the Commissioners of the Five Civilized Tribes." Though her deed was made after the Act of April 21, 1904 (33 Stat. L. 189), which removed the restrictions on the alienation of lands of allottees of the class to which she belonged, it was held that she had nothing before allotment that she could sell. The court said:

> "As the tribes could not sell, neither could the individual members, *for they had neither an undivided interest in the tribal lands nor vendible interest in any particular tract.*"

Speaking of the act removing restrictions the court said:

> "But it did not permit even a non-citizen to sell *a mere float or expectancy.*"

II.

When the allotment was made to the heirs of Minnie Solander after the death of Minnie Solander and after the death of Hettie Solander the allotment was a direct grant to such heirs who took by purchase and the title vested in the heirs only who were to be identified on the date of the allotment and not on the date of the death of Minnie Solander.

If no title vested in Minnie Solander during her lifetime and none vested in her heirs at her death, as is held by the authorities quoted, of course no right in the land in controversy, allotable to the heirs of Minnie Solander, vested in Hettie Solander the child of Minnie Solander, for though she survived her mother, she too died before the lands in controversy were selected for the heirs of Minnie Solander.

The rule of descent in this case did not operate upon the lands allotted to the heirs of Minnie Solander until the allotment was made. But the Supreme Court of Oklahoma says that while that is true, this law relates back to the death of the Indian entitled to the allotment and identifies the heirs as of that date. It goes back therefore to the date of the death of Minnie Solander and finds surviving, her child, Hettie, and her husband George Solander; treats Hettie Solander as having survived the allotment to receive a half interest in it, the remaining half going to George Solander; treats Hettie So-

lander as if she died seized of this half interest; which thereupon was inherited by her father George Solander who thereby takes the whole allotment.

So far as we can discern this is purely an arbitrary result by no means justified or warranted by the legislation bearing on the subject.

The identical question was decided by the Supreme Court of Kansas in the case of *Brown* v. *Belmarde*, 3 Kan. 35. In that case the Indian Lavonture died in 1847 or 1848. In 1860 a grant of his interest in the reservation was made by the government to his heirs. It was held by the court that the title vested in the persons who would have been the heirs of the deceased Indian had he died on May 26, 1860, the date of the grant, and not those who would have taken if the title had vested at the time he died. The descent was effected at the time of the grant which created the estate.

In that case the Act of Congress of May 26, 1860, was the grant to the individuals and left nothing to be done except to identify the heirs. There was no question as to the date when the title vested and it was held that the vesting of the title and the descent to the heirs, which were synonymous with the identification of the heirs, were simultaneous. The court said:

> "His (Lavonture's) interest did not amount to an estate of inheritance, but was a mere life interest in the usufruct. * * * From that time (the death) to the passage of the Act

of May 26, 1860, the whole title to the lands in controversy was in the government. * * * If we are right in our construction of the 6th article, upon Lavonture's death, there was nothing, so far as section nine was concerned, for such heirs to take.

Had Lavonture been living at the time of the passage of the act, the title would have vested in him; and if he had died the next day, there can be no question that his heirs would have been determined by the law of the state at the time of his death. And it would have made no difference if he had lived for a year and the law of descents been changed in the meantime; the law at the time of his death would have furnished the rule. And why? Not simply because of his death at the particular time, but because that was the time at which the estate would pass. The law at the time the estate passes furnished the rule."

Section 28 of the Creek Agreement is the only authority for making allotments for dead Indians. Without it, on the death of Minnie Solander all rights of expectancy, which she had in the lands of the tribe would have died with her, and her heirs would have taken nothing of the tribal lands because they were her heirs.

So this statute provided for allotting to her heirs the lands to which she "*would be entitled, if living.*" The phrase "would be entitled, if living," is very significant and must be considered. The act does not say that "the lands and money to which she *was* entitled shall descend to her heirs and be

allotted to them." If it did, there would be no doubt that Congress assumed and intended that when the Indian died before allotment he was possessed of an estate in the lands of the tribe that passed then to his heirs identified on the date of his death, who immediately rose up in the place of the dead Indian and became possessed of the right he had.

But Congress did not say that. It interposed a condition which must be observed. Instead of saying that the lands or the right in lands which the Indian *had*, shall descend it said:

> "If any such citizen has died since that time (April 1, 1899) or may hereafter die, before receiving *his allotment of lands* and distributive share of all the funds of the tribe, the lands and money to which he *would be entitled, if living*,"

shall descend and be allotted to the heirs. "If living" when? Obviously "if living" when the allotment was made. It could not refer to any other time. It is certain that the right mentioned in the act was supposed by Congress to accrue at some time after the death. The qualifying words would have been useless otherwise. The meaning is the same as if Congress had said "if such citizen die before receiving his allotment, the lands to which he would be entitled if living when the allotment shall be made, shall descend," etc.

Therefore it seems clear that there was no descendible interest in the land or right of the dead

Indian until the allotment was made to the heirs. These heirs were first known and recognized on the date of the allotment. They were identified as of that date for by the legal fiction stated in the act the Indian was supposed to have survived the allotment and then died. For it was only the lands to which he would have been entitled, "if living," at the date of the allotment, that could descend and be allotted to his heirs.

The allotment to the heirs of Minnie Solander was a direct grant to those heirs from the Creek Nation. The question who were or might have been the heirs of Minnie Solander when she died is immaterial. The inquiry is, Who were the heirs on the date of the allotment? It is true that these heirs took by the right of representation of Minnie Solander, but the court is not to be held to an accurate and technical use of the word "descent" as applied to these lands.

In the case of *Mullen* v. *United States*, 224 U. S. 448, the lands involved were allotted in the name of Choctaw Indians whose names appear upon the roll but who died after the ratification of the agreement and before receiving an allotment. In that case the court said:

> "In both cases the lands were to go immediately to the heirs and the mere circumstances that under the language of the statute the allotment was to be made in the name of the deceased ancestor instead of the names of the heirs furnishes no reason for implying a

requirement that there should be a designation of a portion of the lands as a homestead."

In the case of *Hall* v. *Russell* (101 U. S. 503) it was stated by this court:

> "It was provided that the possessory rights of a deceased settler should go to his heirs, and that they might get the land on making the requisite proof without further residence and cultivation of their own. Their title to the land was to come, not from their deceased ancestor, but from the United States. The title, it is true, was granted to them by reason of possessive rights of their ancestor, but these were rights which he could not trnsfer, and which passed to them under the statute without any act of his. On his death his heirs became qualified grantees. * * * We attach no importance to the word 'descend' as used in this section. In section four the word selected to convey substantially the same idea was 'entitled.' The thing done was to give the heirs of a settler the benefit of his rights and to designate them as the recipients of the bounty of the government, instead of him."

See also:

Gritts v. *Fisher*, 224 U. S. 640;

Woodbury v. *United States*, 170 Fed. 302.

We believe that the statute when followed by the allotment to the heirs of Minnie Solander created an estate in such heirs which they took by purchase and not by descent. This allotment then was a direct grant to the heirs who were living at the date of the allotment. If that is true the contention of

the defendant in error would enable him to take as allottee in spite of the fact that he is a non-citizen and not entitled under any theory to share in the "final distribution of the lands" of the tribe. The facts and the law make the heirs of Minnie Solander the first takers of this allotment and we cannot escape the conclusion that they are allottees and therefore must be limited to the members of the tribe.

We believe that the inquiry as to who the heirs were to receive this land must be limited to the time of the allotment. Hettie Solander cannot be used as a bridge to span the gap between Minnie Solander a citizen on the one hand and George Solander a non-citizen. Hettie Solander is simply out of the case entirely. She died before the allotment was made and therefore she took nothing. This case should be treated as if she had never lived. Because the heirs are to be identified among those living at the date of the allotment, and these heirs taking by a direct grant from the Creek Nation they must be limited to members of the tribe.

For it is expressly provided in the last paragraph of section 28 of the Creek Agreement, under which this allotment was made, that lands are to be allotted only to persons found on the Creek rolls. This section reads as follows:

> "The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands,

and the distribution of all moneys and other property of the tribe shall be made, and to no other persons."

This provision is peculiar to the Creek Agreement and is not found in the Choctaw-Chickasaw Agreement, section 22 of which was under consideration in the case of *Mullen* v. *United States*, 224 U. S. 448.

The husband George Solander, being a non-citizen is disqualified by that test and the only heir therefore who could take was Phoebe Trussler, the full sister of Minnie Solander. As such sole surviving heir she was identified by the allotment "to the heirs of Minnie Solander" and became vested with the whole of said lands.

The Supreme Court of Oklahoma holds that upon the death of Minnie Solander in October, 1899, before allotment, her child would inherit one-half of the allotment, which, by Act of Congress passed some eighteen months subsequent to the death of Minnie Solander, should be allotted and distributed to her heirs and descend to such heirs according to the laws of descent and distribution of the Creek Nation. This notwithstanding the fact that long prior to the passage of this act, which created the estate, the child Hettie Solander died. Upon the death of this child under the doctrine of the Supreme Court of Oklahoma, the father of the child, in this case a non-citizen, would inherit that portion of the mother's land which the court holds was in-

herited by the child. That is, the heir (father) of the heir (daughter) would take this allotment of lands under this construction of the act.

Let us go a step further in this interpretation and see where it leads. Suppose for instance, that this non-citizen father of the heir, died before selection of an allotment under this section authorizing the allotment to the heirs of Minnie Solander, leaving surviving him as his heir, his mother, a non-resident, non-citizen of the Creek Nation. Could we for one moment believe that it was the intention of Congress that this total stranger to the blood of Minnie Solander was intended as the beneficiary of this particular act which declares "the lands and money to which he (she Minnie Solander) would be entitled, if living," shall descend to her heirs and be allotted to them? That this stranger should in this devious way become an allottee of the lands of the Creek Nation?

The logical and reasonable rule is that the heirs are to be identified as if Minnie Solander had survived to receive the lands "to which she would be entitled" at allotment, and then died. The law at the time the estate was created furnishes the rule for indentifying the heirs. The heirs so-called, for the purpose of allotment, are in fact the allottees of the land in controversy. And these allottees must be limited to members of the Creek Tribe.

We believe that consideration of the points briefly referred to herein exposes error in the conclusions reached by the Supreme Court of Oklahoma, and that the judgment of that court should be reversed.

Respectfully submitted,

GRANT FOREMAN,
Amicus Curiæ.

JAMES D. SIMMS,
Of Counsel.